

1 Martenson posting a bond in the nominal amount of one hundred dollars because the
2 Court found that “Defendants are more than fully secured by the Property (*Id.*; Doc. 56).”
3 In support of her request for a preliminary injunction, Martenson contended the trustee’s
4 sale was unlawful and invalid (Doc. 34 at 4 n.4, 7). One of the findings supporting
5 injunctive relief was that Defendants had not complied with the Deed of Trust’s
6 requirement that the lender provide the borrower with notice and thirty days to cure the
7 default (Doc. 56).

8 On May 6, 2010, JL Financing recorded a Notice of Rescission of Trustee’s Deed
9 Upon Sale, which states that the Trustee’s Sale and the purported Trustee’s Deed Upon
10 Sale are rescinded (Docs. 74 at 6, 74-2 at 43-45). The Notice also states:

11 3) THE TRUSTEE has been informed by the Beneficiary that the
12 Trustor has contested the Trustee’s Sale and that the Beneficiary desires to
13 rescind the Trustee’s Deed recorded upon the foreclosure sale on June 8,
2009, in order to resolve any contest made by the Trustor regarding the sale
without acknowledging any fault in the conduct of the foreclosure sale;

14 4) THE EXPRESS PURPOSE of this Notice of Rescission is to return
15 the priority and existence of all title and lien holders to the status quo-ante
as existed prior to the Trustee’s Sale.

16 (Doc. 74-2 at 43) By letter dated May 7, 2010, JL Financing notified Martenson she was
17 in default, itemized the amounts due, and demanded payment of \$290,638.34 by June 11,
18 2010 (Doc. 92, Exh. A). The amount due includes \$49,541.23 for “Legal Fees to enforce
19 Note & Deed of Trust.” (*Id.*) A Notice of Trustee’s Sale for September 29, 2010, also
20 was recorded (Doc. 92, Exh. B).

21 On August 20, 2010, the Court denied Plaintiff’s Motion to Enforce Preliminary
22 Injunction to Enjoin Second Sale of Plaintiff’s Home or Alternatively to Modify Its
23 Terms (Doc. 89). The Court found that Defendants had rescinded the trustee’s deed
24 emanating from the disputed trustee’s sale and abandoned the trustee’s sale in dispute,
25 thus nullifying the predicate for the forcible entry and detainer judgment. The Court
26 found that Martenson “remains liable for whatever her obligations are and were under the
27 note and deed of trust, but no additional obligations grounded in the rescinded deed of
28 trust sale.” The Court expressly refrained from determining whether the amounts

1 demanded in the May 7, 2010 demand and cure letter are correct or the amount of the
2 demand invalidated the current notice of trustee's sale because no such claim had been
3 pled.

4 On August 24, 2010, Martenson moved for leave to file a Third Amended
5 Complaint (Doc. 90). The proposed Third Amended Complaint alleges that the May 7,
6 2010 Notice of Default includes in its demand interest, fees, taxes, insurance, and costs
7 accrued during the period of JL Financing's record ownership and the period covered by
8 the preliminary injunction and that Defendants "demand illegal, retroactive payments
9 from plaintiff as a condition to cure the 'new' default under threat of sale of her home."
10 It further alleges that "on the first sale of plaintiff's property on June 8, 2009, plaintiff's
11 personal obligation on the note was extinguished under A.R.S. § 33-814(G) and the note
12 and mortgage were merged with the deed vesting JL Financing with fee simple title to the
13 property."

14 On August 26, 2010, Martenson filed another motion for preliminary injunction.
15 (Doc. 92). The Court denied Martenson's motion in all respects except for her challenge
16 to the inclusion in the cure amount of attorneys' fees incurred in unsuccessfully defending
17 against the first motion for preliminary injunction (Doc. 93).

18 On September 2, 2010, JL Financing and RG Financing stated that, "for the
19 purposes of the foreclosure sale, scheduled for September 29, 2010, Defendants will
20 stipulate and agree to include only those post-injunction fees in the cure amount," which
21 is \$14,978, instead of \$49,541.23 (Doc. 95 at 2). They further stated that, alternatively,
22 they "will withdraw any claim for attorneys' fees in the computation of the cure amount
23 necessary for Plaintiff to cure her default and redeem her property, while reserving the
24 right to litigate the amount of fees properly awarded to Defendants in the substantive case
25 filed in this action." (*Id.*) Martenson did not respond to JL Financing and RG
26 Financing's response that the Court limited to the narrow issue regarding attorneys' fees.
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1 **II. Analysis**

2 Arizona courts strictly construe deeds of trust and related statutes in favor of the
3 borrower. *Patton v. First Fed. Sav. & Loan Ass'n*, 118 Ariz. 473, 477, 578 P.2d 152, 156
4 (1978). Paragraph 21 of the Deed of Trust requires the lender to give notice to the
5 borrower of the default, the action required to cure the default, and a date not less than
6 thirty days from the date of notice by which the default must be cured. It also provides:

7 If the default is not cured on or before the date specified in the notice,
8 Lender, at its option, may require immediate payment in full of all sums
9 secured by this Security Instrument without further demand and may invoke
10 the power of sale and any other remedies permitted by applicable law.
Lender shall be entitled to collect all expenses incurred in pursuing the
remedies provided in this paragraph 21, including, but not limited to,
reasonable attorneys' fees and costs of title evidence.

11 (Doc. 90-2)

12 After default, a trustor may reinstate by paying to the beneficiary, trustee, or the
13 trustee's agent the entire amount then due under trust deed, payment of costs and expenses
14 incurred in enforcing the terms of the trust deed, payment of the recording fee for a
15 cancellation of notice of sale, payment of the trustee's fees, and payment of expenses and
16 reasonable attorney fees "incurred in protecting and preserving the beneficiary's interest in
17 the trust property." A.R.S. § 33-813(A), (B). "On request from the trustor . . . at any time
18 that the trust deed is subject to reinstatement, the trustee shall provide a good faith
19 estimate of the sums that appear necessary to reinstate the trust deed." A.R.S. § 33-
20 813(C). Upon written request from the trustor, the trustee must inform the trustor of the
21 exact amount necessary to reinstate the trust deed, separately specifying costs, fees, and
22 any other amounts that are required to be paid as a condition to reinstatement of the trust
23 deed. A.R.S. § 33-813(D). The trustee must provide the information within five days of
24 receipt of the written request unless it is received during the five business days before the
25 day of the sale, in which case the trustee must provide the information "as soon as
26 practicable." *Id.* Subsection D, however, does not require extension of the period for
27 reinstatement of the trust deed to accommodate providing information regarding the
28 amount of the payment required for reinstatement. *Id.*


1 Thus, under the Deed of Trust, JL Financing was entitled to collect all expenses
2 incurred in pursuing its remedies under the Deed of Trust, including reasonable attorneys'
3 fees. Under statute, JL Financing was obligated to provide Martenson, upon request, "a
4 good faith estimate of the sums that appear necessary to reinstate the trust deed." Further,
5 upon written request, JL Financing was required to provide Martenson the exact amount
6 necessary to reinstate the trust deed. But the request for an estimate or the exact amount of
7 payment does not require the period for reinstatement to be extended nor the trustee's sale
8 to be continued. Moreover, the record does not show that Martenson made any such
9 request.

10 The May 7, 2010 demand and cure letter provided a good faith estimate of the
11 payment required to cure Martenson's default and set a date not less than thirty days from
12 the date of notice by which the default must be cured. On September 2, 2010, JL
13 Financing informed Martenson of a reduction in the amount of payment required to cure
14 her default. Martenson has provided insufficient basis for finding the May 7, 2010 notice
15 of default and demand for cure defective.

16 Therefore, Martenson's Motion for Preliminary Injunction enjoining the sale of her
17 home on September 29, 2010, will be denied.

18 IT IS ORDERED that Plaintiff's Motion for Preliminary Injunction (Doc. 92) is
19 denied.

20 DATED this 17th day of September, 2010.

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24 Neil V. Wake
25 United States District Judge
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